IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 1537 of 1993
Date of Decision: December 21, 2007

Padmawati and others ....Appellants

Versus

Kulwant Rai and others ....Respondents

Coram: Hon'ble Mr. Justice Hemant Gupta.

Present: Shri V.K. Jain, Senior Advocate, with
Shri P.L. Singla and Shri Amanpriya Jain, Advocates,
for the appellants.

Shri R.S. Mittal, Senior Advocate, with
Sarv Shri C.B. Goel, Nitin Jain and Manoj Sharma, Advocates,
for respondent Nos. 1 and 2.

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1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporters or not?

3. Whether the judgment should be reported in the Digest?

HEMANT GUPTA, J.

Defendant Nos. 2, 3 and 4 and some of the legal heirs of defendant No. 1 are in second appeal aggrieved against the judgment and decree passed by the learned first Appellate Court granting decree of specific performance of the agreement of sale dated 12.6.1979.

It is alleged by the plaintiffs that firm of the plaintiff M/s Kanshi Nath and Sons is a tenant under defendant No.1 Amar Nath. The property in dispute has fallen to the share of defendant No.1 on the basis of partition effected amongst three brothers, namely, Amar Nath, Bal Kishan

Dass (defendant No. 4) and Ram Nath by way of registered partition deed dated 11.6.1948. Amar Nath entered into an agreement of sale with respect to the property fallen to his share with the plaintiff and received a sum of Rs.5,000/- as an earnest money. The total sale consideration was fixed at Rs.46,000/-. The sale deed was to be executed on or before 31.12.1979 when the balance sale consideration of Rs.41,000/- was to be paid before the Sub Registrar.

It is pointed out that Bal Kishan Dass (defendant No.4) filed a false and frivolous suit on 6.10.1979 (Exhibit P.13) against Amar Nath and the present plaintiffs claiming prohibitory injunction restraining Amar Nath (defendant No.1) from transferring or managing any portion of the property in dispute. Amar Nath claimed his ownership with respect to the property in dispute. The said suit was decreed on 27.2.1980 (Exhibit P15/1) to the effect that defendant No.1 shall sell or transfer the proprietary rights in respect of the suit property as per the partition deed dated 11.6.1948. Bal Kishan filed another suit for declaration (Exhibit P.11) on 15.4.1980 claiming ownership over the suit property and also claimed a relief of permanent injunction restraining Amar Nath from selling or in any way disposing of any portion of the suit property. The said suit was dismissed on 28.1.1982 (Exhibit P.12). The learned trial Court in the aforesaid suit had granted an exparte injunction order on 18.4.1980 restraining Amar Nath from selling any portion of the suit property as mentioned in para No. 1 of the plaint till further orders.

It is also admitted fact that Amar Nath executed sale deed dated 27.11.1981 (Exhibit P.18) for a sale consideration of Rs.48,000/- in favour of defendant Nos. 2 and 3 i.e. sons of Bal Kishan defendant No.4 and

brother of Amar Nath. After the aforesaid suit for declaration was dismissed on 28.1.1982, the plaintiff filed the present suit for specific performance on 24.3.1982. Amar Nath defendant No. 1 died on 30.10.1983 without filing the written statement. The written statement on behalf of the vendor was filed by his legal representatives alone.

The other undisputed fact is that writing dated 12.6.1979 though titled as the receipt, gives the detail terms and conditions of the sale and also the fact that the sale deed is to be executed on or before 31.12.1979. One of the witnesses of the aforesaid writing is Rajinder Mittal, Advocate and son of Amar Nath. After filing of the suit by defendant No.4 on 6.10.1979, Amar Nath communicated to plaintiffs on 24.10.1979 vide letter Exhibit P.10, after receipt of an exparte order issued by the Court, asking the plaintiffs to send the copies of certain documents to enable his son Shri Rajinder Mittal to prepare the reply and written statement and send directly to the Advocate engaged by the defendants. It is mentioned in the said letter that whole case of Bal Kishan is that he should not sell the portion of the property. Exhibit P.9 is another letter written by Amar Nath to plaintiff-Kulwant Rai. Exhibit P.3 dated 6.12.1979 is the letter written by the plaintiff Kulwant Rai to defendant Amar Nath. In the said letter, the plaintiffs have sought the original instrument of partition with its original plan and sought the presence of the defendant-Amar Nath in the Court. In the said letter, the plaintiff-Kulwant Rai has communicated that he was always ready and willing to perform his part of the contract and get the sale deed registered in his favour according to the terms of the agreement, if Amar Nath is in a position to perform his part of the contract. The said letter was responded by Amar Nath on 11.12.1979 vide Exhibit P.6, pointing out

that it will not be possible for him to visit Ambala in the month of December, 1979 as he is to attend some cases in Delhi and in the month of January, 1980, he will visit Ambala and take necessary steps. Exhibit P.9 is another letter written to the plaintiff by Amar Nath requesting him to deal with the house tax assessment matters of the property in dispute. Exhibit P.1 is the partition deed dated 11.6.1948 on record, whereas the writing, the basis of the suit titled receipt dated 12.6.1979 is Exhibit P.2 on record. There is no dispute between the parties in respect of the aforesaid facts.

At this stage, the issues over which the parties went to trial, need to be reproduced:-

1. Whether the deceased Amar Nath entered into an agreement to sell the property in dispute as alleged? OPP
2. Whether deceased Amar Nath received Rs.5000/- as earnest money as alleged? OPP
3. Whether according to the judgment dated 27.2.80 deceased Amar Nath was authorised to sell his share as alleged? OPP
4. Whether the plaintiffs were always ready and willing to perform their part of the contract as alleged? OPP
5. Whether the deed in favour of the defendant No.2 was obtained by collusion as alleged? OPP
6. Whether the agreement in between the plaintiff and deceased Amar Nath was in the knowledge of defendants No. 2 and 3 at the time of sale deed in their favour as alleged? OPP

7. Whether the property in dispute was joint Hindu family property of Amar Nath and his LRs as alleged? OPD
8. Whether deceased Amar Nath was in possession of the property in dispute as being Karta of the Joint Hindu Family as alleged? OPD
9. Whether the deceased Amar Nath was not competent to enter into an agreement with the plaintiff as alleged? OPD
10. Whether no cause of action has accrued to the plaintiffs to file this suit as alleged? OPD
11. Whether the defendants No. 2 and 3 are bona-fide purchasers as alleged? OPD
12. Whether the plaintiffs have not come with clean hands to the Court if so its effect? OPD
13. Whether the deceased Amar Nath entered into an agreement in the year 1978 to sell the property in dispute as alleged? OPD
14. Whether the suit is not maintainable in the present form as alleged OPD
15. Whether the suit is bad for misjoinder of the necessary parties as alleged? OPD
16. Relief.

Learned trial Court returned a finding that document Exhibit P.2 is an agreement and that the plaintiffs were always ready to perform their part of the contract and it was defendant No.1, who did not execute the

sale deed. It was also found that Amar Nath was not competent to enter into an agreement with the plaintiff for sale of the property as it was a Joint Hindu Family Property and he was only a Karta of the same and that the plaintiffs have not averred that the agreement was for the benefit of the legal heirs of defendant No.1 or that Amar Nath had a legal necessity to dispose of the property and thus, issue Nos. 7, 8 and 9 were decided in favour of the defendants and against the plaintiffs. It was also found that defendant Nos.2 and 3 had no knowledge of the agreement Exhibit P.2. The learned trial Court thus, found that defendant Nos. 2 and 3 are bona-fide purchasers. In view of the findings on the aforesaid issues, the suit was decreed to the extent of recovery of Rs.5,000/- against the legal heirs of defendant No.1 along with interest @ 12% p.a.

It is also an admitted fact that Amar Nath defendant No.1 died leaving behind Smt. Padmawati his widow, six sons and a daughter. All the 8 successors of deceased Amar Nath were impleaded as his legal heirs. However, the judgment and decree passed by the learned trial Court reflected his widow, 3 sons and a daughter as the legal heirs of the deceased. An appeal against the judgment and decree passed by the learned trial Court was filed against those legal representatives, who were reflected in the judgment and decree passed by the learned trial Court and not against all the 8 legal heirs, who were ordered to be impleaded as legal heirs of the deceased-Amar Nath.

In appeal, the learned first Appellate Court reversed the finding on issue Nos. 5 and 6 holding that the sale deed in favour of defendant Nos. 2 and 3 was obtained in collusion with defendant No.1 so as to deprive the plaintiff the fruit of the agreement of sale executed. The learned first

Appellate Court also set aside the finding of trial Court on issue No.11 holding that defendant Nos. 2 and 3 were not the bona-fide purchasers of the suit property without notice to the agreement of sale. The finding on issue Nos. 5, 6 and 11 were not disputed by the learned counsel for the appellant in the present appeal. On the other hand, the learned counsel for the plaintiff-respondents did not dispute the findings recorded on issues No. 7 and 8. Thus, the issues which are, inter-alia, in dispute are issues No. 4, 8, and 9.

I have heard the learned counsel for the parties on the following substantial questions of law:-

i) Whether the deceased Amar Nath was competent to enter into an agreement with the plaintiff as a Karta of his Hindu Undivided Family?

ii) Whether deceased Amar Nath was required to recite in the agreement of sale that he is entering into an agreement of sale as Karta of the Hindu Undivided Family and whether such an agreement binds the other coparcernars?

iii) Whether the plaintiff was required to plead and prove that the agreement to sell regarding the Joint Hindu Family Property by Amar Nath is for the benefit of the family and on account of legal necessity and an act of good management?

iv) Whether the plaintiff has pleaded and proved that he was ready and willing to perform his part of the contract from the date of the agreement till the

date of institution of the suit?

v) Whether the plaintiff's first appeal could be allowed when the decree against some of the legal heirs of deceased Amar Nath for recovery of earnest money has attained finality?

The agreement to sell is in the form of receipt (ExhibitP.2). One of the witnesses to the said receipt is Rajinder Mittal, Advocate and son of Amar Nath. It has also come on record that the said agreement is in fact, scribed by Rajinder Mittal, as deposed by PW2 Kulwant Rai, plaintiff and PW3- Mangat Ram, the other attesting witness. Still further in letter dated 24.10.1979 (Exhibit P.10), Amar Nath, has communicated to the plaintiff that his son Rajinder Mittal would prepare the reply and written statement in the suit filed by Bal Kishan. The powers of Karta have been described in 16th Edition of Principles of Hindu Law by Mulla to the following effect:-

"General powers of manager of joint family business:-

Besides the power to contract debts for the family business, the manager has the power of making contract, giving receipts, and compromising or discharging claims ordinarily incidental to the business. Without a general power of that kind, it would be impossible for the business to be carried on at all.

Alienation by manager of coparcenary property for legal necessity.

(1) The power of the manager of joint Hindu family to alienate joint family property is analogous to that of a manager for an infant heir as defined by the Judicial

Committee in *Hanuooman Persaud v. Musummat Babooee (1856) 6 Moo I.A. 393*.

(2) The manager of a joint Hindu family has power to alienate for value joint family property, so as to bind the interest of both adult and minor co-parcerners in the property, provided that the alienation is made for legal necessity, or for the benefit of the estate. A manager (not being the father) can alienate even the share of a minor coparcener to satisfy an antecedent debt of the minor's father (or grandfather) when there is no other reasonable course open to him. It is not necessary to validate the alienation that the express consent of the adult members should have been obtained.

(2a) Where a joint family consists of adults and minors, the mere fact that all the adults members including the manager have consented to the alienation is not proof of legal necessity. Such consent, however, many supply and lacuna that may exist in the evidence of legal necessity.

(3) When an alienation is made by the manager without legal necessity, but with the consent of all other coparceners, they being all adults, the alienation is valid in its entirety. If it is made without the consent of all, it would in Bombay and Madras, bind the shares of the consenting members. In West Bengal and Uttar Pradesh, where a coparcener cannot alienate even his own interest without the consent of all other coparceners, the

alienation would not bind the shares either of the alienor or of the consenting members.

(4) An alienation by the manager of a joint family made without legal necessity is not void, but voidable, at the option of the other coparceners. They may affirm it or they may repudiate it, but a creditor cannot repudiate it, there being no suggestion that it was a fraud of creditors."

Apart from such interpretation, the powers of Karta were delineated by the Hon'ble Supreme Court in **Sunil Kumar and another v. Ram Parkash and others AIR 1988 Supreme Court 576**. The relevant extracts from the judgment read as under:-

"21. In a Hindu family, the Karta or manager occupied a unique position. It is not as if anybody could become manager of a joint Hindu family. "As a general rule, the father of a family, if alive, and in his absence the senior member of the family, is alone entitled to manage the joint family property." the manager occupies a position superior to other members. He has greater rights and duties. He must look after the family interests. He is entitled to possession of the entire joint estate. He is also entitled to manage the family properties. In other words, the actual possession and management of the joint family property must vest in him. He may consult the members of the family and if necessary take their consent to his action but he is not answerable to every one of them.

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23. The managing member or karta has not only the power to manage but also power to alienate joint family property. The alienation may be either for family necessity or for the benefit of the estate. Such alienation would bind the interests of all the undivided members of the family whether they are adults or minors. The oft quoted decision in this aspect is that of the Privy Council in Hanuman Parshad v. Mt. Babooee, (1856) 6 Moo Ind. App 393. There it was observed at p. 423: (1) " The power of the manager for an infant heir to charge an estate not his own is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in case of need, or for the benefit of the estate." This case was that of a mother, managing as guardian for an infant heir. A father who happens to be the manager of an undivided Hindu family certainly has greater powers to which I will refer a little later. Any other manager however, is not having anything less than those stated in the said case. Therefore, it has been repeatedly held that the principles laid down in that case apply equally to a father or other coparcener who manages the joint family estate."

In **Sital Prasad and others v. Ajablal Mander and others, AIR 1939 Patna 370,** it was found that there are certain limitations upon Karta of a joint Hindu family to alienate the property, which is owned by joint family. The reasonable limit which can be imposed on the Karta is that he must act

with prudence and prudence implies caution as well as foresight excluding hasty, reckless and arbitrary conduct.

In **Muraka Properties (P) Ltd. v. Beharilal Murarka, AIR 1978 SC 300**, the Hon'ble Supreme Court recognised the power of the Manager of a Joint Hindu Family to alienate for value Joint Hindu Family Property so as to bind the interest of both adult and minor members of the family, provided such alienation is made for the benefit of the estate.

In **Sri Narayan Bal and Others V. Sridhar Sutar and Others (1996) 8 SCC 54**, an argument was raised before the Hon'le Supreme Court that sale of undivided interest of the minor in the Joint Hindu Family Property is void for the lack of permission from the Guardian Court. It was held that for sale of the share of a minor in the Joint Hindu Family Property, the permission of the Court is not required in terms of Sections 6 and 12 of the Hindu Minority and Guardianship Act, 1956. Having found that no guardian is required to be appointed in respect of undivided interest of minor in the Joint Hindu Family Property as provided under Sections 6 and 12 of the Act, the permission of the Court is not required. It was held to the following effect:-

> “But since there need be no natural guardian for the minor's undivided interest in the joint family property, as provided under Sections 6 and 12 of the Act, the previous permission of the Court under Section 8 of disposing of the undivided interest of the minor in the joint family property is not required. The joint Hindu family by itself is a legal entity capable of acting through its Karta and other adult members of the family in management of the

> joint Hindu family property. Thus Section 8 in view of the express terms of Sections 6 and 12, would not be applicable where a joint Hindu family property is sold/disposed of by the Karta involving an undivided interest of the minor in the said joint Hindu family property The question posed at the outset therefore is so answered."

In view of the aforesaid judgment, it is apparent that permission for sale of a minor's undivided share in the Joint Hindu Family Property is not required as the Karta is authorised to act on his behalf. Therefore, the Karta is authorised to sell the share of an adult member of the Joint Hindu Family. Thus, Amar Nath as a Karta of Joint Hindu Family, was competent to enter into an agreement with the plaintiff. Therefore, in respect of the first Substantial question of law, it is held that a Karta of a Hindu Undivided Family has a right to alienate the Joint Hindu Family Property for the benefit of the estate and/or legal necessity. Such alienation is binding on all the coparceners including the minors.

Learned counsel for the appellant has argued with vehemance that receipt Exhibit P.2 is an agreement entered upon by Amar Nath in his individual capacity and not as Karta of Joint Hindu Family and the said agreement is not binding on the other coparceners. It is contended that reading of the agreement does not show that it was intended to bind other coparceners nor there is any recital that it is in respect of the Hindu Undivided Family. Reliance is placed upon **Khali Panigrahi v. Kamala Devi, AIR 1967 Orissa 100**.

It is correct that in the agreement Exhibit P.2, there is no

reference that the said agreement is in respect of a Joint Hindu Family Property or that it is on behalf of a Karta. However, it is not necessary that in respect of a Joint Hindu Family Property, it is required to be recited in the agreement itself that the agreement is in respect of Joint Hindu Family Property or that it is being executed by Karta. In **Mt. Jasodar Dusadhin v. Mt. Sukurmani Mehtrani and another, AIR 1937 Patna 353,** it was held that as in between members of a joint Hindu family the fact that the name of one member rather than that of another or of all the members is used in acquisition of property, does not amount to holding out of that member as the ostensible owner.

Admittedly, the property fell to the share of Amar Nath in family partition in the year 1948. On account of partition of the Joint Hindu Family Property, the property falling to the share of Amar Nath would be deemed to be a Joint Hindu Family Property. A Karta of a Joint Hindu Family Property is not required to be appointed by the coparceners. By fiction of law and his status in the family, the oldest male member acts as a Karta. The duties, responsibilities and the obligations of the Karta have been expressed by the Authoritative Commentators on Hindu Law and in judicial precedents. The revenue record is not determinative of the fact whether the property is a Joint Hindu Family Property or not. As and when any question arises whether a particular property is Joint Hindu Family Property, the same is required to be examined keeping in view the origin of the same and how it devolved upon lineal male descendants. Once, the sequence of devolution is proved, the property is deemed to be Joint Hindu Family Property in the hands of a male holder. All acts of a Manager or a Karta are on behalf of the coparceners. It is not required to be recited in the

agreement or the document that such Karta is to act on behalf of the coparceners. It is the source of power in the Karta, which is relevant and not the form in which the agreement is moulded. Therefore, it is not necessary to recite in the agreement that the agreement is on behalf of coparceners of the Joint Hindu Family. The finding of the Orissa High Court is without any discussion and consideration of any precedent. Therefore, such judgment does not lay down any precedent that it is required to be recited in the agreement itself that it is on behalf of the Hindu Undivided Family.

In **State of Karnataka v. Muniyalla AIR 1985 Supreme Court 470,** the Hon'ble Supreme Court held that the recitation of a wrong provision under which the order is made would not render the order invalid. Later in **Kishun Singh v. State of Bihar, (1993)2 SCC 16**, the Hon'ble Supreme Court found that though the power was exercised under Section 319 of the Code of Criminal Procedure to summon the appellant therein, but there is no reason to interfere with the impugned order as it is well settled that once it is found that the power exists, the exercise of power under wrong provisions would not render the order illegal or invalid. Similarly, in **Peerless General Finance and Investment Co. Ltd. v. Reserve Bank of India, AIR 1992 Supreme Court 1033**, it has been held that when authority takes an action, which is within its competencne, it cannot be held to be invalid merely because it purports to be made under a wrong provision, if it can be shown to be within its power under any other provision. In **Union of India and another v. Tulsiram Patel, AIR 1985 Supreme Court 1416,** a Constitutional Bench of the Hon'ble Supreme Court has held as under:-

"There cannot be an exercise of a power unless such

> power exists in law. If such power does not exist in law, the purported exercise of it would be an exercise of a non-existent power and would be void. The exercise of a power is, therefore, always referable to the source of such power and must be considered in conjunction with it. Where a source of power exists, the exercise of such power is referable only to that source and not to some other source under which were that power exercised, the exercise of such power would be invalid and without jurisdiction. Similarly, if a source of power exists by reading together two provisions, whether statutory or constitutional, and the order refers only to one of them, the validity of the order should be upheld by construing it as an order passed under both these provisions. Further, even the mention of a wrong provision or the omission to mention the provision which contains the source of power will not invalidate an order where the source of such power exists."

On the basis of the analogy of the above principles of law, it is immaterial that Amar Nath as Karta of Hindu Undivided Family has not mentioned in the agreement that he is executing the agreement on behalf of the Hindu Undivided Family. Mere omission to mention the same will not render the agreement invalid and ineffective. Once, it is found that Amar Nath as Karta of Hindu Undivided Family was competent to enter into an agreement, it is wholly immaterial that it was not recited in the agreement that the said agreement is on behalf of Hindu Undivided Family. The nature

of agreement is not dependent upon the words used. Thus in respect of second substantial question of law, it is held that it was not necessary to be recited in the agreement that it is on behalf of Hindu Undivided Family so as to bind other coparceners.

Learned counsel for the appellant has referred to a Division Bench judgment of this Court reported as **Balmukand L. Hira Nand v. Pindi Dass (deceased) and others, AIR 1958 Punjab 267**, which was affirmed by the Hon'ble Supreme Court in **Balmukand v. Kamla Wati and others, AIR 1964 Supreme Court 1385** and a Division Bench judgment of this Court reported as **Anil Kumar v. Ranbir Singh, 1988 (2) PLR 510**, to contend that the manager of the Joint Hindu Family is not entitled to sell the Joint Hindu Family Property except for the benefit of the family and that in a suit for specific performance of a contract of sale based upon an agreement executed by the manager of the family, the plaintiff is required to prove that such sale is for the benefit of the family.

In **Balmukand's case (supra)**, in a suit for specific performance, the plaintiff pleaded that defendant No.1 as a Manager was fully competent to make alienation of the property of the Joint Hindu Family and one of the issues framed in the aforesaid suit was whether the alleged sale was for the benefit of the Joint Hindu Family. It was on the basis of the evidence led on the issue framed, the Court found that the sale is not for the benefit of Joint Hindu Family. In the present case, the legal heirs of defendant No.1, who have filed the written statement were satisfied by raising a plea that Amar Nath was not competent to enter into an agreement of sale and that the said agreement is not binding upon the defendants and was not entered upon with the consent of the answering

defendants. It was not pleaded that the agreement was executed without any legal necessity. The relevant extracts from the written statement read as under:-

> "Para No. 5 of the plaint is not admitted and is denied. The plaintiffs be put to the strict proof thereof. At any rate Shri Amar Nath deceased was not competent to enter into any alleged agreement. The said alleged agreement if any, is not binding upon the answering defendants, the property in dispute being Joint Hindu Family Property. The property in dispute being Joint Hindu family property, the alleged agreement if any is not binding upon the answering defendants and the alleged agreement was not entered into by Shri Amar Nath deceased with the consent of the answering defendants."

In **Anil Kumar's case (supra)** again the defendant specifically took up the plea that the transaction was not for the benefit of the family. There was an issue framed in the aforesaid case. In view of the said plea, the question of benefit of the family was examined in the said case.

There was no issue framed in the present case with regard to whether such agreement is for the benefit of the family or not. Having failed to raise any dispute about the legal necessity or lack of the benefit of the family, the defendant-appellants cannot be permitted to raise such a question in the second appeal, which is a question of fact. Since the question of legal necessity or benefit of the estate was not raised nor any issue was framed, the judgments referred to by the learned counsel for the appellants have no application to the facts of the present case. As a matter of fact, the question of competency of the Manager or Karta of a Joint Hindu

Family Property on the ground, it being on account of legal necessity or as an act of good management, would be required to be examined after the completion of sale. The transaction of sale entered by the Karta is not void. It is voidable at the instance of the other coparceners on proof of lack of legal necessity or lack of benefit to the family.

In **R. Kuppayee and another v. Raja Gounder, (2004)1 SCC 295**, the Court was seized of a question of a gift of Joint Hindu Family Property executed by a Karta in favour of his daughters. It was held there in that it is for the other coparceners to plead and prove that the gift made by the father was excessive or unreasonable. It was held to the following effect:-

> "It was for the respondent to plead and prove that the gift made by the father was excessive or unreasonable, keeping in view, the total holding of the family. In the absence of any pleadings or proof on these points, it cannot be held that the gift made in this case was not within the reasonable limits of the property held by the family. The respondent has failed to plead and prove that the gift made was to an unreasonable extent."

Thus, I am of the opinion that it was not necessary for the plaintiffs to plead and prove in the suit for specific performance that the agreement entered upon by the Karta of a Joint Hindu Family was for legal necessity or for the benefit of the family. It is only after the completion of sale and if the other coparceners choose to dispute the alienation effected by the Karta of the Joint Hindu Family, that such question would be required to

be examined. However, in the present case, the other coparceners have not raised any pleading in respect of lack of legal necessity or benefit of the family. Therefore, it is not open to the defendant-appellants to raise an argument that in pursuance of the agreement entered upon by the Karta of a Joint Hindu Family, the decree for specific performance cannot be granted. What is required to be examined is the right of the executant of the agreement to execute the document so as to bind the entire Joint Hindu Family. The Karta of a Joint Hindu Family has the right to sell the property subject to the limitations on his power to alienate as mentioned above.

The defendants have rightly not raised any plea that the transaction of agreement of sale in favour of the plaintiff has disputed the lack of legal necessity or for the benefit of family in respect of the transaction of sale entered upon by Amar Nath in favour of the plaintiffs. In fact, Amar Nath sold the property in favour of his nephews on 27.11.1981 i.e. after more than 2 years of the agreement of sale entered upon with the plaintiffs for a sale consideration of Rs.48,000/-, though the agreement in favour of the plaintiffs was for a sum of Rs.46,000/-. Such transaction of sale is not in dispute. The fact that the sale was for the benefit of the family could not be disputed by the defendants as in fact, sale by Amar Nath in favour of defendant Nos. 2 and 3 has not been disputed by the other coparceners. Thus, the third substantial question of law is answered against the appellants and in favour of the defendants.

Learned counsel for the appellants has vehemently argued that the plaint is to conform to the ingredients laid down in Form 47 and Form 48 of Appendix A to the Code of Civil Procedure i.e. the plaintiff is always ready and willing to perform his part of the contract and is ready with the

money for execution of the agreement. Learned counsel for the appellants has referred to **Ouseph Varghese v. Joseph Aley and others, (1969)2 SCC 539, Abdul Khader Rowther v. P.K. Sara Bai and others, (1989)4 SCC 313, N.P. Thirugnanam (Dead) by LRs v. Dr. R. Jagan Mohan Rao and others, (1995)5 SCC115** and **His Holiness Acharya Swami Ganesh Dassji v. Sita Ram Thapar, (1996)4 SCC 526**, to contend that the plaintiffs have failed to prove that the they had at their command the amount ready to perform their part of the contract and thus, the decree for specific performance could not have been granted.

The plaintiffs have pleaded that after the temporary injunction was granted by the Civil Court, the plaintiffs approached Amar Nath to execute the sale deed and to receive the balance price but Amar Nath has been putting off the matter on one pretext or the other. It is also pleaded that in an earlier letter, Amar Nath admitted the existence of the agreement and requested for some more time to complete the sale. Such communication was in reply to the letter of the plaintiffs requesting the defendant-Amar Nath to do the necessary acts to complete the contract. The relevant averments contained in para Nos. 10, 11 and 16 of the plaint, read as under:-

> "10. That after the decision of the temporary injunction the plaintiff approached Shri Amar Nath to execute the sale deed and receive the balance price but Shri Amar Nath has been putting off on one pretext or the other.
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> 11. That earlier to that Shri Amar Nath wrote a letter to the plaintiff No. 1 Kulwant Rai and admitted the existence of the agreement of sale and also asked for some more time. This was in reply to the letter of the

plaintiff requesting him to do all necessary acts to complete the contract and execute the sale deed.

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16. That the plaintiffs have always been ready and willing to perform their part of the contract. They have always been offering Amar Nath to execute the sale deed. Amar Nath had colluded with the defendant Nos. 2 and 3 and 4 and has executed the sale deed in favour of the defendant Nos. 2 and 3 with respect to the property mentioned above."

In reply to such paras, the case of the defendants is of a simple denial. The plaintiffs vide Exhibit P.3 dated 6.12.1979 communicated that the plaintiffs are always ready and willing to perform their part of the contract. The subsequent conduct of the plaintiffs and defendant No.1 in contesting the suit filed by Bal Kishan also shows that the plaintiff and defendant No.1 were ad-idem in respect of sale and purchase of the property inter-se. The plaintiff Kulwant Rai, while appearing as PW2 has deposed that he was ready and willing to get the sale deed registered in pursuance of the agreement Exhibit P.2 and is even now ready to get the sale deed registered. It is beyond dispute that it is for the plaintiff to plead and prove that he was/is always ready and willing to perform his/her part of the contract. Such facts are required to be pleaded and proved in terms of Section 16 of the Specific Relief Act, 1963. The plaintiffs have pleaded in respect of his readiness and willingness to seek performance of the agreement. It is also well settled that such ready and willingness is required to be inferred from the entire reading of the plaint and the evidence led. It is

not the mere use of the words, which is relevant but the intention of the plaintiff has to be examined keeping in view the averments made in the plaint.

In **Udhav Singh v. Madhav Rao Scindia, AIR 1976 Supreme Court 744,** the Hon'ble Supreme Court has held that a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence and passage and to read it out of the context, in isolation. Although it is the substance and not merely the form that has to be looked into. The intention of the party concerned has to be gathered, primarily, from the tenor and term of his pleading taken as a whole.

The judgments referred to by the learned counsel for the appellants are not applicable in the facts of the present case. **Ouseph Varghese's case**, was a case of suit for specific performance based upon oral agreement of sale. But during the course of arguments, the Court found that rarely a decree for specific performance of the agreement on the basis of agreement to sale supported by oral evidence is to be granted. In **Abdul Khader Rowther's case (supra),** it was found as a matter of fact that there was no pleading which may conform to the requirement prescribed in Forms 47 and 48 of the first Schedule of the Code of Civil Procedure and that the plaintiff had been and still ready and willing to perform his part of the contract.

In **Syed Dastagir v. T.R. Gopalkrishna Setty, (1999)6 SCC 337**, while considering the question of readiness and willing to perform the essential terms of the contract, the Hon'ble Supreme Court held that in construing a plea in any pleading, courts must keep in mind that a plea is not an expression of art and science but an expression through words to

place fact and law of one's case for a relief. It was further held that such an expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting the plea. It was held to the following effect:-

> "Thus, to gather true spirit behind a plea it should be read as a whole. This does not distract one from performing his obligations as required under a statute. But to test whether he has performed his obligations, one has to see the pith and substance of a plea. Where a statute requires any fact to be pleaded then that has to be pleaded may be in any form. The same plea may be stated by different persons through different words; then how could it be constricted to be only in any particular nomenclature or word. Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form. So to insist for a mechanical

production of the exact words of a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded."

In **Motilal Jain v. Ramdasi Devi, (2000)6 SCC 420**, the Supreme Court has the occasion to consider the **Ouseph Varghese's case (supra)** and **Abdul Khader Rowther's case (supra)**. The Hon'ble Supreme Court has also referred to **Ramesh Chandra Chandiok and another v. Chuni Lal Sabharwal (dead) by his legal representatives and others, AIR 1971 SC 1238** and **Syed Dastagir's case (supra)**. It was held that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfil his part of the obligations under the contract which is the subject matter of the suit, the fact that they are differently worded will not militate against the readinesss and willingness of the plaintiff in a suit for specific performance of contract for sale. The aforesaid judgments were quoted with approval in **Sugani (Mst.) v. Rameshwar Das and another, (2006) 11 SCC 587.**

In view of the aforesaid principles of law and keeping in view the averments of the plaintiffs in the plaint and the evidence, oral and documentary, it is apparent that the plaintiffs have not only pleaded that they were ready and willing to perform his part of the contract, but also that he is ready and willing to perform his part of the contract. The suit was filed soon after the suit filed by Bal Kishan was dismissed though during the pendency of the said suit, said Amar Nath has executed sale in favour of his

nephews. In the present case, the plaintiff has expressed his unequivocal intention to seek execution of the agreement of sale in communication dated 6.12.1979 (Exhibit P.3). In the plaint, the plaintiff has expressed his willingness to get the sale deed executed. In the evidence again, the plaintiff has expressed his intention regarding ready and willingness to get the sale deed executed. Therefore, I do not find any merit in the argument raised that the plaintiff has not pleaded or proved that he was not ready and willing to perform his part of the contract.

Another supplementary argument raised by the learned counsel for the appellants is required to be dealt with at this stage itself. It is argued that in agreement Exhibit P.2, the amount of damages has been ascertained, therefore, a decree for damages alone could have been granted as suit was filed on 24.3.1982 though the last date for execution and registration of the sale deed was 31.12.1979. The suit has been filed after two years and three months of the last date for the execution of the sale deed. Therefore, in terms of Section 20 of the Specific Relief Act, 1963, the Court should have granted only the damages. Reference was made to **K.S. Vidyanadam and others v. Vairvan, (1997)3 SCC page 1.**

No doubt, the suit has been filed after two years and three months of the date fixed for the execution of the sale deed but the fact remains that Bal Kishan whose sons had ultimately purchased the property, filed two suits. The first suit was filed on 6.10.1979 i.e. even before the last date for execution of the sale deed. There was ad-interim injunction restraining Amar Nath to execute the sale deed. The said suit was dismissed on 27.2.1980 but soon thereafter, on 15.4.1980 Bal Kishan filed another suit. In the said suit, again there was an ad-interim injunction restraining

Amar Nath to execute the sale deed. Even though, there was an injunction still, Amar Nath executed the sale in favour of his nephews on 27.11.1981. It was only on 28.1.1982 that the said suit was dismissed. The present suit has been filed lastly two months thereafter i.e. on 24.3.1982. Therefore, it cannot be said that there was any delay in filing of the present suit.

The legal heirs of the said Vendor or the predecessors or the vendees have not raised any plea in respect of hardship in the written statement. It was for the defendants to plead and prove the circumstances to decline the relief of specific performance of the agreement of sale. It was open to the appellants to raise a plea of hardship in terms of Section 20 of the Specific Relief Act, 1963. Amar Nath, the vendor has already effected sale of his share of the property. Though it is well settled that the jurisdiction to grant decree for specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the Court is not arbitrary and is based upon judicial principles. The hardship is a question of fact. The escalation of price of the real estate (**Govind Ram v. Gian Chand, (2000)7 SCC 548);** inadequacy of consideration or the mere fact that contract is onerous to the defendant or improvident in its nature (**K. Narendra v. Riviera Apartments P. Ltd., (1999)5 SCC 77** and **Sargunam (Dead) by LRs. v. Chidambaram, 2004 (4) RCR (Civil) 727)**, have not been considered as sufficient grounds to decline the decree for specific performance of the agreement. Therefore, the fourth substantial question of law is answered against the appellants holding that the plaintiffs have proved their readiness and willingness to perform their part of the contract.

The learned counsel for the appellants has vehemently argued

that Amar Nath died on 30.11.1983 leaving behind his widow Padmawati, six sons and one daughter. All such legal heirs were impleaded to represent the estate of the deceased, but while filing the appeal against the judgment and decree passed by the learned trial Court in respect of return of the earnest money, five of the legal heirs were impleaded and three legal heirs were not impleaded. Reference was made to **State of Punjab v. Nathu Ram, AIR 1962 Supreme Court 89**, to contend that since the appeal was not filed against all the legal representatives on record, the appeal abates in its entirety. The said judgment was followed in **Rameshwar Prasad and others v. Shambehari Lal Jagannath and another, AIR 1963 Supreme Court 1901** and a Full Bench judgment in **Mt. Parwati Kuer and others v. Manna Lal Khetan and others, AIR 1956 Patna 414**, wherein it was held that a decree cannot be passed against a person, who is not a party to the appeal. Relying upon **Sheela wd/o Vijay Choudhari and others v. Central Bank of India and others, 1998(1) Maharashtra Journal 928,** it was argued that the failure to implead all the legal heirs is fatal to the appeal as judgment of the trial Court has attained finality as far as non impleadment of the legal representatives is concerned. It is argued that since vendor is a necessary party, therefore, non impleading of some of the legal heirs of the vendor in appeal results into non-joinder of necessary parties and consequently, the decree for specific performance cannot be granted.

According to undisputed facts on record, the judgment and decree passed by the learned trial Court reflected only five legal heirs representing deceased Amar Nath as party in the suit. The first appeal was filed against all the said legal representatives. The question which is now required to be examined is whether the non-impleading of some of the legal

representatives of the deceased Amar Nath will result into contradictory judgment and decree and that suit in the absence of all the legal heirs is vitiated.

The suit has been filed against Amar Nath. It was only during the pendency of the suit Amar Nath died. A common written statement was filed on behalf of 7 of the legal heirs i.e. except Rajinder A. Mittal. The written statement was signed by Shri Virender A. Mittal for self and as duly constituted attorney of Dr. Mohinder A. Mittal, Dr. Vinod A. Mittal, Dr. Usha A. Mittal and Shri Satinder A. Mittal. Shri Rajinder Mittal has neither filed a written statement nor appeared as a witness. He is the person, who has scribed the agreement Exhibit P.2 and also he was the person whose name appears in the letters written by Amar Nath, for the purposes of filing of the written statement and contesting the suit filed by Bal Kishan.

It is not the case of the appellants that the power of Attorney given by Dr. Mohinder Mittal and Dr. Vinod A. Mittal has since been revoked. Therefore, the non impleading of Mohinder A. Mittal and Surinder A. Mittal is only an irregularity as Shri Virender A. Mittal is a duly constituted attorney for the said persons as well who was impleaded as respondent in the appeal. Similarly, non impleading of Rajinder A. Mittal, is wholly inconsequential as he has not contested the suit. Still further no such objections regarding the maintainability of the first appeal was raised before the first Appellate Court. Had any objections been raised at that stage, the plaintiff could take corrective measures at that stage itself.

It may be noticed that Order 22 Rule 4 Sub Rule 4 as amended by the Punjab and Haryana High Court, contemplates that if a decree has been passed against a deceased-defendant, a person claiming to be his legal

representative may apply for setting aside of the decree qua him if it is proved that he was not aware of the suit or that he had not intentionally failed to make an application to bring himself on the record. Sub Rule 5, contemplates that before setting aside the decree under Sub rule (4), the Court must be satisfied prima-facie that had the legal representatives been on the record a different result might have been reached in the suit. In view of the said provisions, it was open to the legal representatives to move an application before the first Appellate Court for setting aside of the decree passed against them by the first Appellate Court or even to file an appeal against the said decree before this Court. Still further, the interest of the legal representatives, who had not been impleaded in the first appeal is not materially different from the present appellants for the reasons mentioned above.

Still further, Amar Nath has executed sale of his entire share in favour of his nephews on 27.11.1981. After effecting sale, Amar Nath or his legal heirs are not left with any right, title or interest in the property which could be defended by them. No doubt, the vendor is a necessary party as held by the Hon'ble Supreme Court in **Dwarka Prasad Singh and others v. Harikant Prasad Singh and others, AIR 1973 SC 655** and by a Full Bench judgment of Kerala High Court in **Ammukutty Amma and another v. Madhavi Amma, 1971 Kerala 90**, but the said principle has to be applied keeping in view the facts of the present case. In the aforesaid case, the Court found that the vendor is a necessary party so as to give effect to special covenants in the agreement of sale which could be given effect to only by the vendor. Learned counsel for the appellants has not referred to any special covenant entered upon by the vendor which was to be given

effect to by the vendor at the time of execution of the sale deed. The agreement of sale in favour of the plaintiffs was to confer all rights and title in the suit property in favour of the plaintiff and such rights have been transferred by the vendor in favour of defendant Nos. 2 and 3. Therefore, non impleading of such legal heirs is not of any material consequence.

A Full Bench of this Court in **Sardara Singh and another v. Harbhajan Singh and others, AIR 1974 Punjab and Haryana 345**, has found that all the legal heirs are not required to be served as their interests are fully protected by the other legal heirs, who are already on record. It was held that what is to be seen is whether the estate is effectively represented. In **Hari Singh v. Mangal Singh etc., 1968 Current Law Journal (Pb. & Hyna.) 922**, this Court held that in the absence of any fraud or collusion between the plaintiff to indicate that there has not been a fair or real trial, or that against the absent heir there was a special case which was not and could not be tried in the proceeding, the doctrine of sufficient representation shall be attracted. A Division Bench of this Court in **Baldev Singh and others v. Hira and others, 1972 PLR 422**, has held that despite the death of one of the legal representatives of the deceased party, his estate continues to be fully represented by the remaining legal representatives. Therefore, there is no question of total or partial abatement.

In **Daya Ram and others v. Shyam Sundari and others, AIR 1965 Supreme Court 1049**, the Hon'ble Supreme Court held that where a plaintiff or an appellant after diligence and bona-fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are and brings them on record within the time limited by law, there is no abatement of the suit or appeal and the impleaded legal representatives sufficiently

represent the estate of the deceased and a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record. It was further held that in a case where the person brought on record is a legal representative it would be in consonance with justice and principle that in the absence of fraud or collusion the bringing on record of such a legal representative is sufficient to prevent the suit or the appeal from being abated.

In the present case, there are no allegations of fraud, misrepresentation or collusion by any of the legal heirs with the plaintiffs. The appeal has been contested before the first Appellate Court and before this Court with all vehemence. The interest of all the legal heirs of the deceased had been and is common. The estate of deceased Amar Nath is sufficiently represented, which binds not only the appellants but also the legal heirs, who have not been specifically impleaded as the party in the appeal. The service upon the defendant, who has not contested the suit, i.e. Rajinder Mittal, could be dispensed with by the first Appellate Court in exercise of the powers conferred on the first Appellate Court in terms of Order 41 Rule 14(3) as inserted by this Court vide notification dated 11.4.1975. As regards the remaining non-represented legal representatives, they were represented before the trial Court through a duly constituted attorney, which attorney was impleaded as the respondent in the first appeal. In the absence of any plea or evidence that the attorney stood revoked, it would be a case of mere irregularity by not reflecting their names in the memo of parties as their interest stands represented by their attorney.

In view of the principles of law discussed above, even this substantial question of law is answered against the appellants.

Thus, I do not find any reason to interfere with the findings recorded, in the present appeal. Hence, the present appeal is dismissed with no orders as to costs.

December 21, 2007 (HEMANT GUPTA)
ds JUDGE